Decision of the Commissioner for Environmental Information on an appeal made under article 12(5) of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations)

Case CEI/19/0018

Date of decision: 5 December 2019

Appellant: Mr. X

Public Authority: ESB

Issue: Whether ESB was justified in refusing the appellant's request for access to minutes (and associated documents) of meetings in relation to repair works to any of the three units of Moneypoint Power Station from 1 April 2018 to the date of the request

Summary of Commissioner's Decision: The Commissioner found that ESB was justified in refusing the appellant's request under article 9(2)(a) of the AIE Regulations. He affirmed ESB's decision accordingly.

Right of Appeal: A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

Background

On 17 January 2019, the appellant requested access to a number of categories of information relating to the Moneypoint Power Station, including, at item 7, all documents in relation to any Moneypoint units going offline the year before and/or repair works to any of the Moneypoint's three units from 1 January 2018 to the date of the request. On 5 February 2019, the appellant refined his request at ESB's invitation with the result that item 7 was broken down into two parts. Part 7a of the request encompassed all environmental information contained in the minutes (and associated documents) of meetings in relation to any Moneypoint units going offline the year before and/or repair works to any of Moneypoint's three units from 1 April 2018 to the date of the request.

In a decision dated 15 February 2019, ESB refused part 7a of the request under article 9(2)(a) of the AIE Regulations on the basis that processing this part of the request would place an unreasonable and unsustainable administrative burden on ESB and its staff. ESB explained that it would have to take a number of steps to process the request in line with the guidance set out in my decision in Case CEI/16/0045 (Killross Properties Ltd. and ESB). It noted that a preliminary search had returned an estimated 21,000 records of potential relevance. It stated:

> "Carrying out the above process would require staff members to manually read through each of these records to ascertain whether they were relevant to your request and then to consider if those particular records contained environmental information. The estimated time to obtain and review (i.e. carry out steps 1 to 3 [of the 5 steps set out above in ESB's decision] these records by experienced employees dedicating 5 hours per working day is estimated conservatively at 350 man days. This exercise alone would place an unreasonable burden on ESB."

ESB also considered the public interest under article 10(3) of the Regulations. It noted that dealing with the request would expose ESB to a disproportionate burden in terms of diverting staff resources from delivering its essential services to the Irish public, including the delivery of important national infrastructure and maintaining continuity of supply. It concluded that the public interest lay in favour of refusing part 7a of the request in the circumstances.

On 19 February 2019, the appellant requested an internal review in relation to part 7a of his request. He disputed that ESB staff would have to manually read through each of the 21,000 records identified in the preliminary search carried out. He considered that modern computing technology should facilitate the search for relevant information and the categorisation of such information into certain identified subtopics. He therefore rejected the claim that it would take 350 man days in order to determine which of the 21,000 records relate to his request.

In a decision dated 15 March 2019, ESB divided part 7a of the appellant's request into two further parts and granted access to three documents relating to Moneypoint units going offline the year before. ESB affirmed its original decision with respect to part

7a(b) of the appellant's request, i.e. minutes (and associated documents) of meetings in relation to repair works. The appellant appealed to my Office on 26 March 2019. He specified that he wished to appeal "Part B" of part 7a of his original request.

I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the appellant's statement of appeal and to the submissions made by ESB. I have also had regard to: the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister's Guidance); Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based; the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention); and The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide').

I note that on 10 April 2019, my Office invited the appellant to make submissions in support of his appeal. On 8 November 2019, my Office wrote to the appellant again for the purpose of notifying him of further relevant details provided by ESB in its submissions. The appellant was given a further period of two weeks, i.e. until 22 November 2019, in which to make any comments that he considered may be relevant to my review. To date, however, no submissions from the appellant have been received. I now consider it appropriate to bring this matter to conclusion by way of a formal, binding decision.

Scope of Review

This review is concerned solely with the question of whether ESB was justified in refusing access to additional environmental information contained in the minutes (and associated documents) of meetings in relation to repair works to any of Moneypoint's three units from 1 April 2018 to the date of the request.

Analysis and Findings

Article 9(2)(a) of the Regulations provides that a public authority may refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought. In this case, as noted above, the appellant has challenged the claim that article 9(2)(a) applies because he considers that with modern computing technology it should not be necessary to read through and process the 21,000 records identified in the preliminary search carried out.

However, in its submissions to this Office, ESB has explained that two of the three Moneypoint units (MP1 & MP3) underwent planned overhauls during 2018, and that all three units underwent turbine repairs. ESB identified 66 employees as overhaul project stakeholders who would hold records for ESB in relation to the overhaul works. In addition, the number of contractors working on behalf of ESB during the overhauls averaged between 250-300, a number of whom would also hold information for and on behalf of ESB.

A high-level records search was carried out firstly for the two Project Managers only to ascertain how many records they may hold. The estimated number of meetings that the Project Managers held during the period of the MP1 and MP3 overhauls is 3350. ESB listed daily and weekly meetings of various types ranging from safety and maintenance to procurement and contracts. Minutes of certain types of meetings are believed to have been recorded in hard copy notebooks rather than electronic form. However, an electronic search for emails referencing "meetings" or "minutes" yielded 2856 additional records for both Project Managers.

A high-level search for records of meetings held for the wider project overhaul team estimated 12,000 records and for the turbine team an estimated 3,000 records. Again, it is believed that most of these meetings are recorded in hard copy notebooks rather than in electronic form.

It is on the basis outlined above that ESB estimated that 21,000 records would need to be read through and processed. As was previously explained to the appellant, ESB further estimates that the time to obtain and review the records by experienced employees dedicating 5 hours per working day is 350 business days.

The details set out above were largely notified to the appellant on 8 November 2019 but he made no response. Thus, for instance, he has not suggested that ESB misunderstood the scope of his request or the potential relevance of the minutes recorded in hard copy notebooks rather than in electronic form and the emails referencing "meetings" or "minutes". In the circumstances, I accept that the time that would be required to retrieve and process the 21,000 potentially relevant records would impose an unreasonable burden on ESB's staff resources.

As ESB has explained, experienced employees would be required to examine and process the potentially relevant records. I agree that this would result in disproportionate diversion of resources from the other important services that ESB provides to the public. I note, however, that ESB has released the readily retrievable information falling within the scope of the appellant's original request, including the three documents relating to Moneypoint units going offline that were made available on internal review. Applying article 10(3) of the Regulations, I agree with ESB that the public interest served by disclosure in this case does not outweigh the interests served by refusal. Accordingly, I find that ESB was justified in refusing the appellant's request on the basis that article 9(2)(a) applies.

Decision

Having carried out a review under article 12(5) of the AIE Regulations, I affirm ESB's decision to refuse the appellant's request under article 9(2)(a) of the Regulations.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not

later than two months after notice of the decision was given to the person bringing the appeal.

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Peter Tyndall
Commissioner for Environmental Information
5 December 2019